IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 747

HENRY A. WALLACE, SECRETARY OF AGRICULTURE, AND HENRY A. WALLACE, SECRETARY OF AGRICULTURE, HOMER CUMMINGS, ATTORNEY GENERAL, AND DANIEL C. ROPER, SECRETARY OF COMMERCE, SITTING AS A COURT UNDER THE GRAIN FUTURES ACT,

Petitioners,

vs.

ARTHUR W. CUTTEN,

Respondent.

BRIEF AND ARGUMENT OF ARTHUR W. CUTTEN, RESPONDENT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND APPENDIX.

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MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE.

There are certain circumstances, not referred to in the petition, which the respondent deems essential to a consideration of this petition and answer.

The complaint, (R. 10-25), which was initiated on April 9, 1934, referred only to alleged omissions during the years 1930 and 1931. It was not alleged in the complaint, and the evidence utterly failed to show, that the respondent was

attempting at the time of the filing of the petition to manipulate the market price of grain, or that he was then acting in contravention of the Grain Futures Act of 1922 or any of the rules and regulations made pursuant thereto. Admittedly all of the offenses were past offenses anywhere from 2 to 4 years old.

On May 14, 1934, a hearing was begun at Chicago, Illinois, before a referee designated by the Commission (R. 25). At the outset of the hearing (R. 26), respondent, by his counsel, read and filed a motion to quash the complaint and all proceedings thereunder, on the ground that the proper construction of Section 6 (b) of the Grain Futures Act of 1922 did not authorize the particular complaint and the proceedings, and on the further ground that if said section was to be construed as the Secretary had construed it in the initiation and prosecution of the complaint, then the section was unconstitutional (R. 27, 28, 29, 30). It was agreed that the motion to quash should go with the case to the Commission, and the referee proceeded to take testimony. At the conclusion of the complainant's evidence, the respondent moved (1) to strike complainant's evidence (R. 260), (2) renewed the motion to quash the complaint (R. 271), and (3) moved to dismiss the complaint (R. 272), and, relying on the merits of these motions, offered no evidence. The motions were argued in briefs filed with the Commission and thereafter denied (R. 461).

OPINION BELOW.

For the convenience of the Court, the opinion of the United States Circuit Court of Appeals for the Seventh Circuit (R. 479) is set forth in the Appendix (*infra*, pp. 25 to 30).

The opinion of the said Court is now reported in the Advance Sheets for the Federal Reporter, Second Series. It appears in the publication for the week of February 3, 1936, Vol. 80 (2d)—No. 2, pages 81-272, being printed at page 140 of the Advance Sheets of said date.

STATUTE INVOLVED.

The complete text of the Grain Futures Act of 1922 is set forth in the Appendix (*infra*, pp. 31 to 40).

SUMMARY OF ARGUMENT.

I.

THE CIRCUIT COURT OF APPEALS CORRECTLY CONSTRUED SECTION 6 (b) OF THE GRAIN FUTURES ACT OF 1922.

The statute authorizes only summary proceedings having as their immediate objective, the prompt exclusion of a practice then believed by the Secretary of Agriculture to be currently operating in and affecting, contract markets.

A comparison of the texts of Section 6 (a) and Section 6 (b), respectively, leads to the conclusion that the respective statutory texts were used advisedly.

Attempts to corner grain are punishable under the Anti-Trust Act of 1890. (15 U. S. C. A. sec. 2.)

The speed with which the proceedings shall move forward rests entirely in the discretion of the Commission.

The construction reached by the Circuit Court of Appeals cannot reduce the Act to a nullity, because administrative surveillance of the contract markets is daily, thorough and complete.

The Congress intended that administrative officials should not wait until manipulative practices were beyond treatment.

The legislative history respecting trading in grain futures indicates that the sponsors of the legislation recognized that the primary purpose of Section 6 (b) of the Act was the prevention of presently occurring objectionable practices,—not the punishment of acts long since past and having no relation to existing conditions.

The apparently deliberate choice of expression in the respective texts of Section 6 (a) and Section 6 (b) supports

the construction given to Section 6 (b) by the Circuit Court of Appeals.

Commonwealth v. *Woodring*, 289 Pa. 437, 137 Atl. 635, 639.

II.

PETITIONERS' CONSTRUCTION OF SECTION 6 (b) WOULD BE UNCONSTITUTIONAL.

Statutes are to be construed not only so as to avoid the conclusion that they are unconstitutional, but also so as to avoid grave doubts upon that score.

United States v. *Jin Fuey Moy*, 241 U. S. 394, 401.

Federal Trade Commission v. *American Tobacco Co.*, 264 U. S. 298, 307.

United States v. *Delaware & Hudson Co.*, 213 U. S. 366, 407.

A proceeding brought against individuals who pursue their occupation and calling under no permit, license or designation, seeks the infliction of a penalty.

Petitioners' construction invalidates the section, since it would assume an attempt by the Congress to confer upon a legislative agency, the members of which are procured from the executive branch of the government, the purely judicial power to order the infliction of a penalty for the violation of law.

Wong Wing v. *United States*, 163 U. S. 228.

Such proceedings would be unconstitutional as depriving the accused individual of trial by jury, in violation of the Sixth and Seventh Amendments to the Constitution.

Wong Wing v. *United States*, 163 U. S. 228.

There would be a lack of due process in such proceedings, in that one of the members of the administrative

tribunal would occupy the dual capacity of complainant and judge.

Tumey v. *Ohio*, 273 U. S. 510, 534.

Before the terms "manipulate" and "manipulation" may be used as a statutory basis for the infliction of a penalty, there must be a statutory definition thereof so that accused individuals will not be required to guess at the meaning of the words.

Connally v. *General Construction Co.*, 269 U. S. 385.

ARGUMENT.

I.

THE CIRCUIT COURT OF APPEALS CORRECTLY CONSTRUED SECTION 6 (b) OF THE GRAIN FUTURES ACT OF 1922.

In support of the petition, it is argued that the provisions of Section 6 (b) of the Grain Futures Act of 1922 were intended to authorize the Secretary of Agriculture to institute proceedings seeking an order barring individuals from trading in the contract markets as punishment for past violations of the Grain Futures Act, as well as proceedings seeking to curb alleged violators from the successful culmination of presently threatened or pending attempts to manipulate the market price of grain. In support of petitioners' construction it is said that, unless the Act is so construed, it is reduced to a nullity, and administrative officials rendered powerless to discharge the responsibilities placed upon them by the legislation.

Respondent contends: (1) That the construction of Section 6 (b) of the Grain Futures Act of 1922 reached by the Circuit Court of Appeals is strictly in accordance with the text and purpose thereof; that it is supported by the established canons of construction, and fortified by the history of the legislation; (2) That the construction does not render the Act a nullity, and, having in mind a diligent administration of the Act, provides the Secretary with a process which is prophylactic in character; (3) That petitioners' argument is primarily legislative rather than judicial, in its appeal; (4) That to extend by construction the plain language of the section, is to place an unconstitutional interpretation on the Act.

Petitioners view Section 6 (b) as authorizing the insti-

tution of proceedings purely punitive in character. Respondent contends that the purpose and scope of the legislation is supervisory and remedial, and that it was intended only to provide a method for the exclusion of manipulative practices reasonably thought to be then existing in, or threatening the safety of, contract markets and the market price of grain.

The first Future Trading Act, passed by the 67th Congress on August 24, 1921, which was an attempt to regulate trading in grain futures under the authority of the taxing power, was held unconsfitutional by this Court in *Hill* v *Wallace,* 259 U. S. 44, in an opinion handed down May 15, 1922.

The Grain Futures Act of 1922 was then enacted at the Second Session of the 67th Congress, and approved September 21, 1922. It was upheld by this Court (certain constitutional objections to Section 6 (b) not being considered because not properly before the Court), as within the purview of the Commerce Clause, in the case of *Board of Trade* v. *Olsen,* 262 U. S. 1. The complete text of the Act is printed as an appendix to this brief.

The primary object of the legislation was the correction of evils brought about by the sudden and unreasonable dislocation in the market prices of grain as the consequence of manipulation of prices on the established grain markets of the United States. The method to be employed for effecting the legislative policy was through licensing and designating certain places as contract markets—the meeting-places or markets whereon and through the facilities of which, contracts were made for the future delivery of grain. As the consideration for such official designation as a "contract market" the governing board of the contract market is required to provide for "the prevention of manipulation of prices or

the cornering of any grain by the dealers or operators upon such board'' (Section 5 (d)). The contract markets receive their designation as such from the Secretary of Agriculture, and this designation, license or permit is the *only* permit or designation provided for by the legislative pattern. Individuals who desire to enter into contracts respecting the future delivery of grain and the commission houses who execute the orders, *are not* so licensed.

In a survey of the Act the provisions of Section 6 (a) should first be noted. These provisions refer only to the revocation of the license issued to the contract market. Whenever it is made to appear to a commission composed of the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General that a contract market—as for example, the Kansas City Board of Trade—*''has failed or is failing''* to comply with any of the requirements incident to its designation, it may be ordered suspended for a period not to exceed six months, or its designation as such contract market revoked. Such proceeding must be accompanied by the following characteristics:

(a) There must be a notice to the officers of the accused contract market, and a hearing.

(b) The order of suspension or revocation does not become final and effective until 15 days after its issuance.

(c) If, within said fifteen-day period, an appeal be perfected to the Circuit Court of Appeals for the circuit in which is located the principal place of business of the market, the order of the Commission *does not* become effective *until the disposition of the appeal.*

The provisions of Section 6 (b) of the Grain Futures Act of 1922 relate only to individuals and are in marked con-

trast to those of Section 6 (a), both in language and in objective.

First, the Secretary of Agriculture must have *reason to believe* that the accused person *"is violating"* some of the provisions of the Act, *"or is attempting to manipulate"* the market price of grain in violation of the provisions of Section 5 of the Act. It is not for a failure to have filed reports, or, for having filed inaccurate reports, apart from an attempt to manipulate, that such proceedings are to be initiated. *Current attempts at manipulation are the proscribed activities.*

Second, upon the issuance of a complaint conforming to the statute, a hearing may be held after *three days'* notice.

Third, the hearing may be held by the Commission, at Washington, D. C., or by a referee designated by the Commission.

Fourth, the burden of removing the implication of manipulative practices is placed upon the individual.

Fifth, in the event of an order excluding the offender from contract markets, and an appeal from such order by the accused individual, there is no statutory supersedeas, as in the case of Section 6 (a); whether or not such order of the Commission shall be stayed during appeal, rests entirely in the discretion of the Circuit Court of Appeals, and turns on the merits of the accused person's application therefor.

The penalty provisions of the Grain Futures Act are to be found in Section 9 thereof. Under the provisions of that section, if any person shall violate Section 4 of the Act (making contracts of sale of grain for future delivery, except on contract markets, and within the exceptions to the Act), or shall fail to evidence any contract of sale by a record in writing, or shall knowingly or carelessly deliver through the mails or interstate commerce false or mislead-

ing information concerning crop or market conditions, such person shall be deemed guilty of a misdemeanor and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both.

Section 9 does not declare a punishment for manipulation or attempted manipulation, and, we submit, for the very excellent reason that a punishment was already provided for such an offense in the then existing statutes. Section 2 of the Anti-Trust Act of 1890 (15 U. S. C. A. Section 2) provides that: "Every person who shall monopolize or attempt to monopolize or conspire to monopolize any part of the trade or commerce of the several states" shall be guilty of a misdemeanor punishable by fine or imprisonment, or both. This was the law upon which the prosecution was based in *United States* v. *Patten*, 226 U. S. 525, in which the complaint charged a conspiracy to corner the cotton market.

Thus, from all of these sections, is the legislative pattern of regulation to be gathered. *First*, the Secretary may proceed against *the contract market* and revoke its designation as such whenever it appears that it "*has* failed or is failing" to enforce rules and regulations designed to prevent manipulation or has not enforced such rules and regulations. *Second*, if the Secretary has reason to believe that *any individual* "*is* violating" any of the provisions of the Act, or "*is* attempting to manipulate" the market price of grain, he may proceed in a summary manner to frustrate and prevent the successful consummation of the violation or of the manipulation. *Finally*, if the violation happens to be one covered by the provisions of Section 9 of the Act, the Secretary may, (1) if the practice is being employed at the time, and in order to prevent the successful culmination of the current violations, close the contract market to the offender (under Section 6 (b)), and (2) cause

the institution of criminal proceedings in respect of past violations already consummated, under Section 9, or the provisions of the Sherman anti-trust law.

The manifest intent and purpose of the Congress was to provide the Secretary, under the provisions of Section 6 (b) of the Act, with a summary process, whereby, acting upon an existing abuse as such, as distinguished from seeking to punish the individual, the Secretary would be enabled to clear the offending practice from the contract markets *at the time* of the alleged manipulations. By this method the successful consummation of a then current manipulation is to be frustrated and prevented. While not in so many words the familiar "cease and desist" order to be found in the legislation authorizing the Federal Trade Commission, (15 U. S. C. A. Sec. 45) it resembles such order, has a similar objective and in actual operation could be as effectively used. The statutory basis upon which rests the authority for the initiation of the complaint, and the issuance of process, is the Secretary's belief that the accused individual *is then violating* the Act or *is then attempting* to manipulate the market price of grain. The Congress intended that under such circumstances, and entertaining such belief, the Secretary of Agriculture should not wait until the abuse was beyond correction. The administrative action is to be immediate and direct.

The language of the section is so plain as to leave no room for construction. The use of the phrase "is violating and is attempting to manipulate the market price of grain"; the provision for a hearing upon three days' notice; the failure to provide for a right to a statutory supersedeas; the transfer of the burden of proof from the Secretary to the accused, all indicate that the proceedings contemplated by the enactment were to operate upon what the Secretary then believed to be an existing and prevalent condition.

The character of the violation should be such as to give rise to a reasonable belief in a continuation of the manipulative practice, unless it be *then cleared* from the contract market. In its general outlines, the proceeding is comparable to the summary abatement of a nuisance. Respondent does not concede the section to be constitutional, even under this construction of the statute, but that precise question does not arise upon the record of this particular case. That can only be presented to and determined by the Courts, when the Secretary proceeds against an accused individual in strict compliance with the text of the section.

Petitioners contend that a literal adherence to the words of the statute would rob the Act of vitality. It is submitted that in advancing this contention, the petitioners place a too literal interpretation upon the section and fail to perceive that it is a current practice—not an isolated offense—which is to be corrected by Section 6 (b). In each case the inquiry is one of fact. The ultimate question is whether the evidence will justify a conclusion that the accused individual is violating the Act, or is attempting to manipulate the market price of grain. Obviously no certain test can be applied, and each case must turn upon its own set of facts. In the case at bar, the Circuit Court of Appeals very properly held that the words of the statute cannot be stretched to include violations completed more than two years before the complaint was filed.

It is said in the petition that the time to be consumed by the proceedings is contrary to a summary objective, and petitioners point to the time consumed in this proceeding by the Commission, and by the Circuit Court of Appeals. What the petition does not make clear, is that the Secretary and the Commission are at liberty to act as promptly as they desire. In this case the actual hearing, including short sessions, occupied but ten days, and the evidence was

unusually voluminous. The Commission may make its own rules of procedure. It may, subject only to the elementary requirements of fair dealing, absolutely control the amount of time to be consumed by the procedure.

Neither the practical operation of the statute, nor the correctness of the construction reached by the Circuit Court of Appeals can be fairly judged without some knowledge of the administrative methods inaugurated for the operation of the statute.

There has been established an administrative agency known as the Grain Futures Administration. Mr. L. A. Fitz (R. 129) is the Administration's Grain Exchange Supervisor, in Chicago, where he has an office with a clerical force. His work consists primarily in receiving reports of transactions upon the Chicago Board of Trade, Chicago Open Board of Trade, Milwaukee Grain and Stock Exchange, and St. Louis Merchants Exchange (R. 138). His office also makes a permanent record of price quotations, checks market gossip, and examines the books and records of commission houses whenever and wherever necessary (a right sustained by the Circuit Court of Appeals for the Seventh Circuit in *Bartlett-Frazier Co.* v. *Hyde*, 65 Fed. (2d) 350, Cert. Den. 290 U. S. 654), in order to verify reports or check matters connected with grain transactions (R. 138). Under the regulations (R. 434, 437, 438) not only are daily reports required from those individuals whose transactions exceed a stated figure (which is varied from time to time), but similar reports are required from those commission houses who execute the transaction for, and carry the accounts of, the individual trader. In this manner the executive officials of the Grain Futures Administration are furnished daily with secret and informative statistics that serve as a basis for the surveillance of the contract market, and disclose the volume of trading in the

market and the character of the individual trading. Ordinarily it is also the practice of the supervisor to report current matters of importance to the Business Conduct Committee of the Board of Trade for correction or discipline (R. 141).

The Circuit Court of Appeals properly declined to place a construction on Section 6 (b) which would permit administrative officials to wait until practices thought to be manipulative had long since been completed, and had entirely ceased to have any possible effect upon, the current prices of grain. The construction placed upon the Act by the Circuit Court of Appeals raises the functions of the Commission above the level of a police court, and it will not require three members of the cabinet to examine complaints and evidence against accused individuals, ranging in seriousness from mere failure to file reports, to the charge of manipulative practices, long after the opportunity for corrective procedure has passed.

As an attempted justification for the construction adopted by the petitioners it is said that in the instant case the administrative officials required two years in order to discover the magnitude and seriousness of the respondent's market operations. The respondent has throughout this litigation vigorously denied that his transactions were of any consequence whatsoever, but petitioners' assertion is refuted by the record. (R. 151, 153, 173.) It appears affirmatively from the testimony that the respondent's omission to file reports in 1930 was known to and excused by the Chicago supervisor at that time. When reports were asked from the respondent in March of 1932 the Chicago supervisor did not ask for reports back of the date of November 30, 1931. (R. 445-446.) The construction sought by the petitioners is asserted primarily to excuse their failure to take, at the time of the

alleged omissions, the steps contemplated by the legislation.

Our contention of a reasonable construction to be given to Section 6 (b) is: suppose that Smith is attempting to manipulate upward the market price of July wheat; that is, wheat which is to be delivered and paid for on the last day of July, 1936. By reports, either from that individual, or from the commission houses, or from the volume of trading in that particular future, or from an examination of the books of the commission houses, the Exchange supervisor has reason to suspect Smith. Under Section 6 (b) the Secretary of Agriculture, being advised of the circumstances and then entertaining the belief that Smith is attempting to manipulate the market price of grain, may issue his complaint and set it down for an immediate hearing. The objective of the Secretary under that hypothesis is not the *punishment* of Smith for misconduct, but administrative action on his part designed to clear the market of the manipulative tendency and protect the market price of grain. If Smith fails to satisfy the Commission that he was not then attempting to manipulate the price of grain, the Commission may enter an order directing the contract markets to refuse him further trading privileges. That order would be for such period of time as would be reasonably necessary to remove the offending trades from the market or protect other traders and holders of grain, and would logically expire on July 31st, the delivery date for the July future. A spread of the manipulative practice and the successful consummation of the manipulative scheme is thus prevented. A critical situation is treated at the time of the crisis by prompt administrative action and not after all opportunity to serve the public good has passed. This, the respondent submits, is the obvious purpose and scope and a logical, common-sense interpretation

of the actual language used in Section 6 (b) in the Grain Futures Act of 1922.

In respect of the legislative history of the enactment, it will be observed that both Sections 6 (a) and 6 (b) were part of the Future Trading Act held unconstitutional by this Court in the case of *Hill* v. *Wallace,* 259 U. S. 44.

When (after the decision in the case of *Hill* v. *Wallace*) the Grain Futures Act was rewritten and the legislation introduced in the House, hearings were held by the House Committee on Agriculture and Forestry. Representative J. N. Tincher, of Kansas, had been the sponsor of future trading legislation in the House of Representatives, and Senator Arthur Capper, of Kansas, was the sponsor in the Senate. Both of these men were active leaders in the advancement of the legislation in the respective houses. That Representative Tincher had a well-defined notion of the purpose of the Act is clear from the reported hearings on the Grain Futures Act before the Committee on Agriculture, House of Representatives, 67th Congress, Second Session. In discussing the provisions of the Grain Futures Act with one of the witnesses who had appeared before the Committee, after that witness had pointed out to the Committee that in spite of the fact that the avowed purpose of the legislation was to prevent manipulation, no penalty was provided therefor, Mr. Tincher said (Committee on Agriculture, House of Representatives, 67th Congress, 2nd Session, June 7, 8, 9, 12, 1922, Hearings on Grain Futures Act, page 35):

> "Mr. Tincher: You suggested a while ago that this bill does not provide a penalty, that it does not provide a punishment for manipulating the market. You are entirely right about that, because we have a law now that does that. The object of this bill was not to punish some man that manipulated the market but to prevent manipulation."

A study of the legislative history of both the Future Trading Act and the Grain Futures Act of 1922 leads inevitably to the conclusion that Congress selected the language used in Sections 6 (a) and 6 (b) deliberately to express in the first section a method of dealing with contract markets for *both present and past* offenses, and in the second section a method of dealing with individuals for the summary prevention of *presently existing* manipulative practices.

The petitioners have cited the cases of *Church of the Holy Trinity* v. *United States,* 143 U. S. 457; *United States* v. *Kirby,* 7 Wall. 482; *Reiche* v. *Smythe,* 13 Wall. 162; *Silver* v. *Ladd,* 7 Wall. 219; *United States* v. *Lacher,* 134 U. S. 624; *United States* v. *Katz,* 271 U. S. 354; and *Sorrells* v. *United States,* 287 U. S. 435.

These authorities stand for one general proposition of undoubted correctness, namely, that all laws should receive a sensible construction. In some of the foregoing cases the proper construction of the penal statutes required a holding that the accused individuals were not within either the spirit or the intent of the legislation; in others, it was held that it would defeat the obvious intention of the enactment to hold that the accused individuals were not within the intent of the statute. The cited authorities represent sound dispositions of the particular situations arising under the particular statutes there involved, but not one of the cases is in point as related to the facts in the case at bar. In none of the cases cited was the language of penal statutes unnecessarily extended by construction.

Petitioners also cite the cases of *Huidekoper's Lessee* v. *Douglass,* 3 Cranch. 1; *Rutherford* v. *Greene's Heirs,* 2 Wheat. 196; *Hayden* v. *Ortkeiss,* 83 Ky. 396; *Maysville & Lexington R. R. Co.* v. *Herrick,* 76 Ky. 122; *Malloy* v. *Chicago & North Western Ry. Co.,* 109 Wis. 29, 85 N. W. 130.

These authorities represent situations wherein the legislature sought to assist individuals, or afford a remedy for some distressing situation. The statutes in those cases were remedial, not penal. As such they were liberally construed. The construction of Section 6 (b), which petitioners contend for, makes it a penal statute. As a penal statute it is subject to a strict construction.

The appropriate rule of construction to be employed in the case at bar is stated in the case of *Commonwealth* v. *Woodring*, 289 Pa. 437, 137 Atl. 635, at page 639. In that case the Pennsylvania court said:

> "This conclusion is buttressed by another rule of contruction, viz., that where, in an agreement, will, or statute there is a change in the method of expression, the presumption, usually of great force, is that the intention was to give to the later words a different meaning from those formerly used. Hence, when the Legislature said in the act of 1925 that certain things 'shall' be done and, later, that certain others 'may' be done, the presumption is that it meant just what it said, else why did it not continue the use of 'shall'?"

So in the instant case, the antithetical expressions in Section 6 (a) and Section 6 (b) require that the two sections be given differing constructions. "Has failed or is failing" in Section 6 (a) means *both past and present* failures. "Is violating or is attempting to manipulate" in Section 6 (b) relates *only* to *presently existing* violations or attempts to manipulate.

Furthermore, where such power is not clearly and unambiguously stated in the words of a statute nor to be fairly inferred from the language employed, statutes are not to be so construed as to create the power to impose and inflict penalties.

A workable scheme of regulation is feasible under the particular statute under scrutiny. If, however, the petitioners deem it necessary to the appropriate administra-

tion of the Act that the Grain Futures Act of 1922 should be broadened, then the remedy, as stated by the Circuit Court of Appeals, rests with the Congress—not the courts.

II.

PETITIONERS' CONSTRUCTION OF SECTION 6 (b) WOULD BE UNCONSTITUTIONAL.

Petitioners would not deny the validity of the respondent's construction of Section 6 (b). They seek, however, by the process of construction, to carry the legislative scope and purpose of the Act beyond the plain and obvious meaning of its language and construe it as authorizing a purely punitive proceeding brought only and solely to punish the offender for some alleged ancient misconduct. It is the respondent's contention that when, under such a construction, a proceeding is brought against an individual trader, who has been pursuing his occupation and business without the requirement of any license, permit or designation of any kind, the obvious end and purpose of the proceeding is the punishment of the accused individual. The proceeding contemplates depriving the individual of his right to pursue his business or occupation for a period of time fixed solely by the Commission. Although civil in form, the objective is essentially penal. The determination of the guilt of the individual is merely the prelude to the exaction of a punitive penalty. No jury is or can be provided. The complainant occupies the position of prosecutor, as well as judge.

Such interpretation, indulged in by the Commission (R. 451-466) and advanced by petitioners in their application for the writ, *assumes* that the Congress of 1922 intended to authorize an administrative agency to find the fact of guilt and exact a penalty from accused individuals for alleged misconduct. This, the respondent submits,

is an obviously unconstitutional interpretation. Until there is specific authority therefor in the text of the section it is not to be assumed that Congress intended to deprive accused individuals of the safeguards set up by the constitution. Petitioner's construction would invalidate the section entirely because: (1) It would involve an attempt by the Congress to confer upon a legislative agency, the members of which are procured from the executive branch of the government, the purely judicial power to order the infliction of a penalty for the violation of law; (2) The accused individual would be denied a trial by jury in violation of the Sixth and Seventh Amendments to the Constitution; (3) There would be a lack of due process, in that one of the members of the administrative tribunal would occupy the dual capacity of complainant and judge; (4) There would be a further lack of due process since the statute is without a statutory definition for the terms "manipulate" and "manipulation".

This argument respecting unconstitutionality is not leveled at the section, as it is written, but as it is interpreted and sought to be enforced by the Secretary and the Commission.

It is well settled by the decisions of this Court that, if a statute be reasonably susceptible of two interpretations, by one of which it is unconstitutional, and by another valid, that construction which will save the statute will be adopted. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407.

Not only is it true that a statute will be construed so as to avoid the conclusion that it is unconstitutional, but it will also be construed so as to avoid grave doubts upon that score. *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401; *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, 307.

This Court held, in *Wong Wing* v. *United States*, 163

U. S. 228, that executive officials could not be constitutionally authorized to inflict a punishment upon aliens found to be illegally within the borders of the United States, although the detection, identification and expulsion of such aliens were already part of the statutory duties of such executive officials; that such punishment could only be inflicted after a trial by jury and in proceedings consonant with the Constitution and its amendments. While in that case punishment for what had been declared to be an infamous crime was involved, the principle there laid down, which prevented the power to punish in the public interest from being exercised at the hands of administrative officials, disposes of the construction contended for by the petitioners in the instant case.

Tumey v. *Ohio,* 273 U. S. 510, is cited as authority for our contention that petitioners' construction offends against the requirement of due process, in that one of the members of the Commission occupies the dual capacity of prosecutor and judge. There this Court held that the mayor of a village was disqualified from acting as judge in the case of accused individuals brought before him, not only because his only prospect of emolument arose through the conviction of the defendant, but also because of his official interest in the outcome of the trial. It was said at page 534, that:

> "A situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him."

In the case of *Connally* v. *General Construction Co.,* 269 U. S. 385, at page 391, this Court held that the terms of a penal statute creating an offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties; that

a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess at its meaning violates the essentials of due process of law. We submit that such vague and unlimited words as "manipulate" and "manipulation" fall within the above category. The statute here provides no definition of manipulation. With the phrase undefined, it is subject to changes in interpretation by each successive Commission. Such indefiniteness has no place in a penal statute.

The construction of Section 6 (b), adopted by the Circuit Court of Appeals, which limits the authority of the Secretary to the exclusion of offending practices from the contract markets, avoids the unconstitutional interpretation of the section which is requested by petitioners, and leaves any question respecting the constitutionality of the particular *procedure* under the statute, to be determined as the particular situation arises.

CONCLUSION.

It is respectfully submitted that the Circuit Court of Appeals properly declined to extend the provisions of Section 6 (b) beyond the purpose expressed by the text of the enactment. To have adopted the petitioners' construction would have been to place an unconstitutional interpretation upon the section. The petition for the writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Arthur W. Cutten, Respondent.

231 South La Salle Street,
Chicago, Illinois,
February, 1936.

APPENDIX.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5467. October Term, 1935, October Session, 1935.

ARTHUR W. CUTTEN, *Petitioner,*

vs.

HENRY A. WALLACE, Secretary of Agriculture, and HENRY A. WALLACE, Secretary of Agriculture, HOMER CUMMINGS, Attorney General, and DANIEL C. ROPER, Secretary of Commerce, Sitting as a Commission Under The Grain Futures Act, *Respondents.*

Petition for Review of Order of Commission Under the Grain Futures Act.

November 25, 1935.

Before EVANS and SPARKS, *Circuit Judges,* and BALTZELL, *District Judge.*

EVANS, *Circuit Judge.* This is a petition for review of the order of the commission (created under the Grain Futures Act) which directed that all contract markets refuse all trading privileges thereon to Arthur W. Cutten of Chicago for a period of two years from March 1, 1935.

Formal complaint against Cutten had been made April 9, 1934, wherein he was charged with various violations of the Act enacted September 21, 1922, commonly known as the Grain Futures Act. A hearing was had before a commission consisting of the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General. Upon the testimony taken, the commission made findings of fact from which we quote the following:

"1. The Chicago Board of Trade was duly designated as a contract market under the Grain Futures Act on May 3, 1923, and it has been a contract market continuously since that date.

"2. During the years 1930 and 1931 respondent was, and now is, a member of the Chicago Board of Trade.

"3. From and after October 31, 1927, through and including the year 1931, members of contract markets were required by regulations made pursuant to the Grain Futures Act to report to the Grain Futures Administration their net position in futures owned or controlled by them, long or short, by grain and by future, when they had net open commitments in any one future equal to or in excess of 500,000 bushels of wheat, corn or oats, and 200,000 bushels of rye or barley.

"4. Respondent in 1930 and 1931 had knowledge of the reporting requirements.

"5. Respondent, in 1930 and 1931, transacted his business through eight commission firms. He split his trade into 35 accounts. He carried some of his accounts in the names of relatives and associates. Respondent owned or controlled each of the 35 accounts.

"6. During the year 1930, respondent did not make any reports to the Grain Futures Administration.

"7. On approximately 130 days during 1930, respondent had open commitments in a single wheat future in accounts owned and controlled by him equal to or in excess of 500,000 bushels.

"8. On approximately 119 days during 1930, respondent had trades in a single wheat future in accounts owned and controlled by him in which he had open commitments equal to or in excess of 500,000 bushels.

"9. During the year 1931, respondent made reports irregularly to the Grain Futures Administration, none of which was true or correct as a statement of his net position on the market on the day covered by such report.

"10. During the year 1931, there were a great many days on which respondent made no reports at all, although having on such days open commitments in a single wheat future, in accounts owned and controlled by him, equal to or in excess of 500,000 bushels.

"11. On approximately 110 days during 1931, respondent had trades in a single wheat future in accounts owned and controlled by him, in which he had open commitments equal to or in excess of 500,000 bushels.

"12. On many days during the years 1930 and 1931, the respondent, in accounts definitely identified as belonging

to him, had open commitments and trades which he failed to report as required by the Act and regulations made pursuant thereto.

"13. During the year 1931, the respondent made false reports of his open commitments and transactions in accounts definitely identified as his and indisputably belonging to him contrary to the act and regulations made pursuant thereto.

"14. Respondent's purpose in concealing his position in the market was to manipulate the price of grain and thereby to make large profits. He systematically allocated purchases and sales of wheat futures to the various accounts in order to keep them under 500,000 bushels, and thus to avoid detection. He attempted to manipulate the price of grain."

The commission also made conclusions wherein it found that Cutten's conduct constituted a violation of the Grain Futures Act and the rules and regulations made pursuant thereto, and that an order should be entered that all contract markets refuse all trading privileges to him for a period of two years. The order, which is here assailed, was thereupon entered.

The Grain Futures Act has been upheld and construed in the following decisions: *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1; *Board of Trade of Chicago* v. *Wallace*. 67 F. (2d) 402; and *Bartlett Frazier Co.* v. *Hyde*, 65 F. (2d) 350.

The commission filed an opinion which dealt at length with the various questions raised by petitioner, which we will consider under two headings: (a) The sufficiency of the evidence to support the findings. (b) The sufficiency of the findings to support the order.

(a) Petitioner asserts that the evidence does not support the findings of the commissioners. With this contention we cannot agree. It would serve no useful purpose to set forth the testimony upon which this conclusion is predicated. It is sufficient to say that the evidence amply supports the findings. It points persuasively to the conclusion that Cutten repeatedly, knowingly, and intentionally, during the deep depression years of 1930 and 1931, when agriculture was waging its losing battle for existence on account of low and ever lower prices, violated and flouted that provision of the rules and regulations promulgated pursuant to the authority of the statute which required him

as a dealer to report the fact that he was short more than 500,000 bushels in any one future.

(b) Whether the findings support the order depends upon the construction which we are required to give to section 6 (b) of the Act. The pertinent statutes read as follows:

"SEC. 5. The Secretary of Agriculture is hereby authorized and directed to designate any board of trade as a 'contract market' when, and only when, such board of trade complies with and carries out the following conditions and requirements: * * *.

"SEC. 6. Any board of trade desiring to be designated a 'contract market' shall make application to the Secretary of Agriculture for such designation and accompany the same with a showing that it complies with the above conditions, and with a sufficient assurance that it will continue to comply with the above requirements.

"(a) A commission composed of the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General is authorized to suspend for a period not to exceed six months or to revoke the designation of any board of trade as a 'contract market' upon a showing that such board of trade *has failed or is failing* to comply with any of the above requirements or is not enforcing its rules of government made a condition of its designation as set forth in section 5. * * *

"(b) If the Secretary of Agriculture has reason to believe that any person *is violating* any of the provisions of this Act, or *is attempting to manipulate* the market price of any grain in violation of the provisions of section 5 hereof, or of any of the rules or regulations made pursuant to its requirements, he may serve upon such person a complaint stating his charge in that respect, * * *. Upon evidence received the said commission may require all contract markets to refuse such person all trading privileges thereon for such period as may be specified in said order. * * *"

Petitioner argues that the power to suspend a trader must be found in section 6(b), and an examination of said section makes it imperative that the trader accused of the wrongdoing condemned by the Act be one who "*is* violating any of the provisions of this Act, or *is attempting to manipulate* the market price of any grain." In other words,

petitioner contends that any violation of the Grain Futures Act of which he *was* shown to have been guilty *was committed* some two years *prior* to the institution of these proceedings, and consequently he is not within the purview of said section 6.

The determination of the appeal, therefore, turns upon the use of the words "is violating" and "is attempting to manipulate" in said section.

Respondents argue that although the statute uses the present tense, it should be so construed as to include past transactions. A rather strong and persuasive argument is made in favor of the wisdom of such a construction, without which the power to deal with an offender is almost nil. We are, however, required to construe the statute, not to pass upon its purposes, but upon its wording.

Support for limiting the construction of the words so as to exclude instances where the violation has occurred may be found in section 6 (a). There, referring to the failure of the board of trade to comply with the requirements of the Act, we find the words "has failed or is failing" to comply with "any of the above requirements." What effect then must we give to the language of 6 (b) where the words "has failed" are omitted?

It is admittedly rather difficult to understand why Congress would, when dealing with the punishment of a Board, include past as well as present violations, whereas in section 6 (b) when dealing with the punishment of the individual trader, it provides for punishment only when such person "is violating" or "is attempting to manipulate the market."

Respondents' counsel, in addition to supporting their argument that the Act, to effectually accomplish its purpose, should be made to cover past offenses as well as existing violations of the Act, call our attention to the following decisions: *Church of the Holy Trinity* v. *United States*, 143 U. S. 457; *United States* v. *Lacher*, 134 U. S. 624; *The Sterling*, 65 F. (2d) 439; *Silver* v. *Ladd*, 7 Wall. 219; *United States* v. *Kirby*, 7 Wall. 482; *Reiche* v. *Smythe*, 13 Wall. 162; *United States* v. *Katz*, 271 U. S. 354; *Sorrells* v. *United States*, 287 U. S. 435; *Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84; *Huidekoper's Lessee* v. *Douglass*, 3 Cranch 1; *Hayden* v. *Ortkeiss*, 83 Ky. 396; *Louisville Southern Railroad Company's Receivers* v. *Lewis*, 101 Ky. 296; *Malloy* v. *Chicago & N. W. Ry.*, 109 Wis. 29; *Rutherford* v.

Greene's Heirs, 2 Wheat. 196; *Maysville & Lexington R. R. Co.* v. *Herrick,* 76 Ky. 122. These decisions are to the effect that a court is justified in departing from the plain language of the statute in order to give it a fair and practical meaning. Among the cases cited are some where the tense of the verb used in the statute is changed.

We are not, however, persuaded that the words of the statute here used can or should be so stretched as to include past violations which were committed and completed two years before the complaint was filed.[1]

We can not ignore the fact that Congress in dealing with contract markets provided for cancellation of rights if violations of regulations *had* occurred whereas in the next section the right to cancel a member's privilege on a contract market was limited to instances where the member *is* violating a regulation. While respondents' counsel has ably argued that the Commission should have the power to suspend for past transgressions and without such authority the section is sterile—yet he has not met the stubborn and inescapable fact that Congress has spoken in two successive sections. In one it expressly included past as well as present violations and in the next section specified only existing violations as ground of suspension. To extend the latter section to the breadth of the former would be usurping the function of Congress.

Under such conditions it is for Congress to amend its legislation, if it deems it wise and desirable so to do, not for courts to do so by judicial construction.

The order is

REVERSED.

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[1] Where there is no ambiguity in words of statute there is no room for statutory construction. *U. S.* v. *Mo. Pac. Ry. Co.,* 278 U. S. 269; *Helvering* v. *N. Y. Trust Co.,* 292 U. S. 455; *Mich.* v. *Mich. Trust Co.,* 286 U. S. 334; *Yorke* v. *U. S.,* 173 U. S. 439; *Texas* v. *Chiles,* 21 Wall. 488; *U. S.* v. *Wiltberger,* 5 Wheat. 76; *Boudinot* v. *U. S.,* 11 Wall. 616; *U. S.* v. *Union Pac. R. Co.,* 91 U. S. 72; *Lewis* v. *U. S.,* 92 U. S. 618; *Doe* v. *Considene,* 6 Wall. 458; *U. S.* v. *Ewing,* 184 U. S. 140; *Amer. Exp. Co.* v. *U. S.,* 212 U. S. 522; *Caminetti* v. *U. S.,* 242 U. S. 470; *U. S.* v. *Hill,* 248 U. S. 420; *U. S.* v. *Standard Brewery Co.,* 251 U. S. 210; *Commissioner* v. *Gottlieb,* 265 U. S. 310; *St. Paul, M. & M. R. Co.* v. *Phelps,* 137 U. S. 528; *Cox* v. *Lott,* 12 Wall. 204; *Russell Motor Co.* v. *U. S.,* 261 U. S. 514; *Duke Power Co.* v. *Commissioner,* 44 F. (2d) 543; *Braffith* v. *People,* 26 F. (2d) 646; *Riverdale Co-op. Assn.* v. *Commissioner,* 48 F. (2d) 711; *So. Carolina Produce Assn.* v. *Commissioner,* 50 F. (2d) 742; *Town of Clayton* v. *Col. & So. Ry. Co.,* 51 F. (2d) 977; *Darby-Lynde Co.* v. *Alexander,* 51 F. (2d) 56; *In re Boggs-Rice Co.,* 66 F. (2d) 855; *McCaughn* v. *Amer. Meter Co.,* 67 F. (2d) 148; *United Electric Coal Co.* v. *Rice, et al.,* decided by this court October 26, 1935.

The Grain Futures Act of September 21, 1922 (U. S. C. Title 7), provides as follows:

An Act For the prevention and removal of obstructions and burdens upon interstate commerce in grain, by regulating transactions on grain future exchanges, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, This Act shall be known by the short title of "The Grain Futures Act."

SEC. 2. (a) For the purposes of this Act "contract of sale" shall be held to include sales, agreements of sale, and agreements to sell. The word "person" shall be construed to import the plural or singular, and shall include individuals, associations, partnerships, corporations, and trusts. The word "grain" shall be construed to mean wheat, corn, oats, barley, rye, flax, and sorghum. The term "future delivery," as used herein, shall not include any sale of cash grain for deferred shipment or delivery. The words "board of trade" shall be held to include and mean any exchange or association, whether incorporated or unincorporated, of persons who shall be engaged in the business of buying or selling grain or receiving the same for sale on consignment. The act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust within the scope of his employment or office shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust, as well as of such official, agent, or other person. The words "interstate commerce" shall be construed to mean commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof, or within any Territory or possession, or the District of Columbia.

(b) For the purposes of this Act (but not in any wise limiting the foregoing definition of interstate commerce) a transaction in respect to any article shall be considered to be in interstate commerce if such article is part of that current of commerce usual in the grain

trade whereby grain and grain products and by-products thereof are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where purchase or sale is either for shipment to another State, or for manufacture within the State and the shipment outside of the State of the products resulting from such manufacture. Articles normally in such current of commerce shall not be considered out of such commerce through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act. For the purpose of this paragraph the word "State" includes Territory, the District of Columbia, possession of the United States, and foreign nation.

SEC. 3. Transactions in grain involving the sale thereof for future delivery as commonly conducted on boards of trade and known as "futures" are affected with a national public interest; that such transactions are carried on in large volume by the public generally and by persons engaged in the business of buying and selling grain and the products and by-products thereof in interstate commerce; that the prices involved in such transactions are generally quoted and disseminated throughout the United States and in foreign countries as a basis for determining the prices to the producer and the consumer of grain and the products and by-products thereof and to facilitate the movements thereof in interstate commerce; that such transactions are utilized by shippers, dealers, millers, and others engaged in handling grain and the products and by-products thereof in interstate commerce as a means of hedging themselves against possible loss through fluctuations in price; that the transactions and prices of grain on such board of trade are susceptible to speculation, manipulation, and control, and sudden or unreasonable fluctuations in the prices thereof frequently occur as a result of such speculation, manipulation, or control, which are detrimental to the producer or the consumer and the persons handling grain and products and by-products thereof in interstate commerce, and that such fluctuations in prices are an obstruction to and a burden upon interstate commerce in grain and the products and by-products thereof and

render regulation imperative for the protection of such commerce and the national public interest therein.

SEC. 4. It shall be unlawful for any person to deliver for transmission through the mails or in interstate commerce by telegraph, telephone, wireless, or other means of communication any offer to make or execute, or any confirmation of the execution of, or any quotation or report of the price of, any contract of sale of grain for future delivery on or subject to the rules of any board of trade in the United States, or for any person to make or execute such contract of sale, which is or may be used for (a) hedging any transaction in interstate commerce in grain or the products or by-products thereof, or (b) determining the price basis of any such transaction in interstate commerce, or (c) delivering grain sold, shipped, or received in interstate commerce for the fulfillment thereof, except—

(a) where the seller is at the time of the making of such contract the owner of the actual physical property covered thereby, or is the grower thereof, or in case either party to the contract is the owner or renter of land on which the same is to be grown, or is an association of such owners, or growers of grain, or of such owners or renters of land; or

(b) Where such contract is made by or through a member of a board of trade which has been designated by the Secretary of Agriculture as a "contract market," as hereinafter provided, and if such contract is evidenced by a record in writing which shows the date, the parties to such contract and their addresses, the property covered and its price, and the terms of delivery: *Provided,* That each board member shall keep such record for a period of three years from the date thereof, or for a longer period if the Secretary of Agriculture shall so direct, which record shall at all times be open to the inspection of any representative of the United States Department of Agriculture or the United States Department of Justice.

SEC. 5. The Secretary of Agriculture is hereby authorized and directed to designate any board of trade as a "contract market" when, and only when, such board of trade complies with and carries out the following conditions and requirements:

(a) When located at a terminal market where cash grain of the kind specified in the contracts of sale of

grain for future delivery to be executed on such board is sold in sufficient volumes and under such conditions as fairly to reflect the general value of the grain and the differences in value between the various grades of such grain, and where there is available to such board of trade official inspection service approved by the Secretary of Agriculture for the purpose.

(b) When the governing board thereof provides for the making and filing by the board or any member thereof, as the Secretary of Agriculture may direct, of reports in accordance with the rules and regulations, and in such manner and form and at such times as may be prescribed by the Secretary of Agriculture, showing the details and terms of all transactions entered into by the board, or the members thereof, either in cash transactions consummated at, on, or in a board of trade, or transactions for future delivery, and when such governing board provides, in accordance with such rules and regulations, for the keeping of a record by the board or the members of the board of trade, as the Secretary of Agriculture may direct, showing the details and terms of all cash and future transactions entered into by them, consummated at, on, or in a board of trade, such record to be in permanent form, showing the parties to all such transactions, including the persons for whom made, any assignments or transfers thereof, with the parties thereto, and the manner in which said transactions are fulfilled, discharged, or terminated. Such record shall be required to be kept for a period of three years from the date thereof, or for a longer period if the Secretary of Agriculture shall so direct, and shall at all times be open to the inspection of any representative of the United States Department of Agriculture or United States Department of Justice.

(c) When the governing board thereof provides for the prevention of dissemination by the board or any member thereof, of false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of grain in interstate commerce.

(d) When the governing board thereof provides for the prevention of manipulation of prices or the cornering of any grain by the dealers or operators upon such board.

(e) When the governing board thereof does not exclude from membership in, and all privileges on, such board of trade, any duly authorized representative of any lawfully formed and conducted cooperative association of producers having adequate financial responsibility which is engaged in cash grain business, if such association has complied, and agrees to comply, with such terms and conditions as are or may be imposed lawfully on other members of such board: *Provided,* That no rule of a contract market shall forbid or be construed to forbid the return on a patronage basis by such cooperative association to its bona fide members of moneys collected in excess of the expense of conducting the business of such association.

(f) When the governing board provides for making effective the final orders or decisions entered pursuant to the provisions of paragraph (b) of section 6 of this Act.

SEC. 6. Any board of trade desiring to be designated a "contract market" shall make application to the Secretary of Agriculture for such designation and accompany the same with a showing that it complies with the above conditions, and with a sufficient assurance that it will continue to comply with the above requirements.

(a) A commission composed of the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General is authorized to suspend for a period not to exceed six months or to revoke the designation of any board of trade as a "contract market" upon a showing that such board of trade has failed or is failing to comply with any of the above requirements or is not enforcing its rules of government made a condition of its designation as set forth in section 5. Such suspension or revocation shall only be after a notice to the officers of the board of trade affected and upon a hearing: *Provided,* That such suspension or revocation shall be final and conclusive unless within fifteen days after such suspension or revocation by the said commission such board of trade appeals to the circuit court of appeals for the circuit in which it has its principal place of business by filing with the clerk of such court a written petition praying that the order of the said commission be set aside or modified in the manner stated in the petition, together with a bond

in such sum as the court may determine, conditioned that such board of trade will pay the costs of the proceedings if the court so directs. The clerk of the court in which such a petition is filed shall immediately cause a copy thereof to be delivered to the Secretary of Agriculture, chairman of said commission, or any member thereof, and the said commission shall forthwith prepare, certify, and file in the court a full and accurate transcript of the record in such proceedings, including the notice to the board of trade, a copy of the charges, the evidence, and the report and order. The testimony and evidence taken or submitted before the said commission duly certified and filed as aforesaid as a part of the record shall be considered by the court as the evidence in the case. The proceedings in such cases in the circuit court of appeals shall be made a preferred cause and shall be expedited in every way. Such a court may affirm or set aside the order of the said commission or may direct it to modify its order. No such order of the said commission shall be modified or set aside by the circuit court of appeals unless it is shown by the board of trade that the order is unsupported by the weight of the evidence or was issued without due notice and a reasonable opportunity having been afforded to such board of trade for a hearing, or infringes the Constitution of the United States, or is beyond the jurisdiction of said commission: *Provided further,* That if the Secretary of Agriculture shall refuse to designate as a contract market any board of trade that has made application therefor, then such board of trade may appeal from such refusal to the commission described therein, consisting of the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General of the United States, with the right to appeal as provided for in other cases in this section, the decision on such appeal to be final and binding on all parties interested.

(b) If the Secretary of Agriculture has reason to believe that any person is violating any of the provisions of this Act, or is attempting to manipulate the market price of any grain in violation of the provisions of section 5 hereof, or of any of the rules or regulations made pursuant to its requirements, he may serve upon such person a complaint stating his charge in that respect, to which complaint shall be attached or

contained therein a notice of hearing, specifying a day and place not less than three days after the service thereof, requiring such person to show cause why an order should not be made directing that all contract markets until further notice of the said commission refuse all trading privileges thereon to such person. Said hearing may be held in Washington, District of Columbia, or elsewhere, before the said commission, or before a referee designated by the Secretary of Agriculture, who shall cause all evidence to be reduced to writing and forthwith transmit the same to the Secretary of Agriculture as chairman of the said commission. That for the purpose of securing effective enforcement of the provisions of this Act the provisions, including penalties, of section 12 of the Interstate Commerce Act, as amended, relating to the attendance and testimony of witnesses, the production of documentary evidence, and the immunity of witnesses, are made applicable to the power, jurisdiction, and authority of the Secretary of Agriculture, the said commission, or said referee in proceedings under this Act, and to persons subject to its provisions. Upon evidence received the said commission may require all contract markets to refuse such person all trading privileges thereon for such period as may be specified in said order. Notice of such order shall be sent forthwith by registered mail or delivered to the offending person and to the governing boards of said contract markets. After the issuance of the order by the commission, as aforesaid, the person against whom it is issued may obtain a review of such order or such other equitable relief as to the court may seem just by filing in the United States circuit court of appeals of the circuit in which the petitioner is doing business a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission by delivering such copy to its chairman or to any member thereof, and thereupon the commission shall forthwith certify and file in the court a transcript of the record theretofore made, including evidence received. Upon the filing of the transcript the court shall have jurisdiction to affirm, to set aside, or modify the order of the commission, and the findings of the commission as to the facts, if supported by the weight of the evidence shall in like manner be conclusive. In

proceedings under paragraphs (a) and (b) the judgbent and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 240 of the Judicial Code.

SEC. 7. Any board of trade that has been designated a contract market in the manner herein provided may have such designation vacated and set aside by giving notice in writing to the Secretary of Agriculture requesting that its designation as a contract market be vacated, which notice shall be served at least ninety days prior to the date named therein as the date when the vacation of designation shall take effect. Upon receipt of such notice the Secretary of Agriculture shall forthwith order the vacation of the designation of such board of trade as a contract market, effective upon the day named in the notice, and shall forthwith send a copy of the notice and his order to all other contract markets. From and after the date upon which the vacation became effective the said board of trade can thereafter be designated again a contract market by making application to the Secretary of Agriculture in the manner herein provided for an original application.

SEC. 8. For the efficient execution of the provisions of this Act, and in order to provide information for the use of Congress, the Secretary of Agriculture may make such investigations as he may deem necessary to ascertain the facts regarding the operations of boards of trade, whether prior or subsequent to the enactment of this Act, and may publish from time to time, in his discretion, the result of such investigation and such statistical information gathered therefrom as he may deem of interest to the public, except data and information which would separately disclose the business transactions of any person and trade secrets or names of customers: *Provided,* That nothing in this section shall be construed to prohibit the Secretary of Agriculture from making or issuing such reports as he may deem necessary relative to the conduct of any board of trade or of the transactions of any person found guilty of violating the provisions of this Act under the proceedings prescribed in section 6 of this Act: *Provided further,* That the Secretary of Agriculture in any report may include the facts as to any actual

transaction. The Secretary of Agriculture, upon his own initiative or in cooperation with existing governmental agencies, shall investigate marketing conditions of grain and grain products and by-products, including supply and demand for these commodities, cost to the consumer, and handling and transportation charges. He shall likewise compile and furnish to producers, consumers, and distributors, by means of regular or special reports, or by such methods as he may deem most effective, information respecting the grain markets, together with information on supply, demand, prices, and other conditions in this and other countries that affect the markets.

SEC. 9. Any person who shall violate the provisions of section 4 of this Act, or who shall fail to evidence any contract mentioned in said section by a record in writing as therein required, or who shall knowingly or carelessly deliver for transmission through the mails or in interstate commerce by telegraph, telephone, wireless, or other means of communication, false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of grain in interstate commerce, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than one year, or both, together with the costs of prosecution.

SEC. 10. If any provision of this Act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby.

SEC. 11. No fine or imprisonment shall be imposed for any violation of this Act occurring before the first day of the second month following its passage.

SEC. 12. The Secretary of Agriculture may cooperate with any department or agency of the Government, any State, Territory, District, or possession, or department, agency, or political subdivision thereof, or any person; and shall have the power to appoint, remove, and fix the compensation of such officers and employees, not in conflict with existing law, and make such expenditures for rent outside the District of Columbia, printing, telegrams, telephones, law books, books of reference, periodicals, furniture, stationery,

office equipment, travel, and other supplies and expenses as shall be necessary to the administration of this Act in the District of Columbia and elsewhere, and there are hereby authorized to be appropriated, out of any moneys in the Treasury not otherwise appropriated, such sums as may be necessary for such purposes.

Approved, September 21, 1922.